

**PETITION UNDER 28 USC § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

United States District Court

**District
of MASSACHUSETTS**

Name **Michael Kevin DuPont**

Prisoner No. **W/44692**

Case No. **11431**

Place of Confinement

**MCI CEDAR JUNCTION ('Walpole State prison')
PO Box 100
South Walpole, MA. 02071**

*PLAINTIFF'S OFFICE
2004 JUN 17 P 12:12*

U.S. DISTRICT COURT OF MASS.

Name of Petitioner (include name under which convicted)

MICHAEL KEVIN DUPONT

Name of Respondent (authorized person having custody of petitioner)

**V. DAVID NOLAN, Superintendent
MCI Cedar Junction**

The Attorney General of the State of: **MASSACHUSETTS**

PETITION

1. Name and location of court which entered the judgment of conviction under attack **Nos. 85-981 thru 85-987
Middlesex Superior Court, 40 Thorndike Street, Cambridge, MA. 02141**
2. Date of judgment of conviction **November 10, 2000**
3. Length of sentence **20 years to 20 years and one day, with lesser
9-10 and 3-5 year concurrent sentences and filed over objection**
4. Nature of offense involved (all counts) **Armed Robbery, armed assault with intent to kill,
armed assault with intent to rob, assault by means dangerous weapon
and assault, assault and battery. ONLY (Armed Robbery) #85-987 is
still being served AND subject to Habeas Corpus Review**
5. What was your plea? (Check one)
 - (a) Not guilty
 - (b) Guilty
 - (c) Nolo contendere
 If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details:
Armed Assault with Intent To Rob filed over objection without a plea

and prior trial acquittal of intent to murder element of armed assault
6. If you pleaded not guilty, what kind of trial did you have? (Check one)
 - (a) Jury
 - (b) Judge only
7. Did you testify at the trial?
 Yes No (this was retrial and I testified in 1986 prior trial)
 Not At This Stage After Case Allowed 1988 New Trial
8. Did you appeal from the judgment of conviction?
 Yes No

9. If you did appeal, answer the following:

- (a) Name of court Massachusetts Appeals Court, COMMONWEALTH v. DUPONT 02-P-20
- (b) Result Denial Of Plea Withdrawl Judgment Affirmed *1102*
- (c) Date of result and citation, if known 59 Mass App Ct 908 (September 5, 2003)
- (d) Grounds raised Ta Denial Of Counsel Without Waiver Of Counsel; Coerced Involuntary Guilty Plea After 100 Days in Strip Cell; Judicial Plea Bargaining And Breach Of Negotiated Sentence Contract Due Process Violations; Ex Post Facto Clause Guideline Violation; Denial Of Speedy Trial And Delayed Appeal/Sentencing; Conflict Of Sentencing Counsel Interest etc
- (e) If you sought further review of the decision on appeal by a higher state court, please answer the following: DOUBLE JEOPARDY VIOLATION
- (1) Name of court Supreme Judicial Court
- (2) Result Rule 17.1 ALOFAR denied
- (3) Date of result and citation, if known January 29, 2004 440 Mass
- (4) Grounds raised each and every ground in this Petition, copy of 02-P-20 briefs filed with SJC as ALOFAR, incorporating 01-P-1792 good time habeas corpus briefs therein by reference on unknowing plea
- (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal: (Being filed in April 2004 from 02-P-20 & 01-P-1792)
- (1) Name of court SUPREME COURT APRIL 23, APRIL 26, 2004
- (2) Result Pending No. 03-10062 DUPONT V MASSACHUSETTS
Pending No. 03-10227 DUPONT V COMMISSIONER
- (3) Date of result and citation, if known DOWA V TOVAR AND BLAKELY V WASHINGTON
- (4) Grounds raised DENIAL OF COUNSEL AND AGGRAVATED PUNISHMENT ELEMENT

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes No

11. If your answer to 10 was "yes," give the following information:

- (a) (1) Name of court Worcester Superior Court
- (2) Nature of proceeding State Habeas Corpus
- (3) Grounds raised Due Process Violation In Nature Of Ex Post Facto Clause
Violation, Absence Of Fair Notice/Indictment, Double Jeopardy, Absence Of Proof Of 3,000 Day Aggravated Punishment Element;

EACH AND EVERY GROUND FROM 02-P-20 INCORPORATED INTO 01-P-1792

APPEAL FROM THIS HABEAS CORPUS, PRESENTED IN THIS FEDERAL

HABEAS CORPUS NOW !!!

- (4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

- (5) Result Habeas Corpus Denied

- (6) Date of result May 4, 2001

- (b) As to any second petition, application or motion give the same information:

- (1) Name of court _____

- (2) Nature of proceeding _____

- (3) Grounds raised _____

- (4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

- (5) Result _____

- (6) Date of result _____

- (c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes No 59 Mass App Ct 1102 (9/5/03)
(2) Second petition, etc. Yes No ALOFAR Denied January 29, 2004

- (d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting the same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (h) Denial of right of appeal.

12A) Due Process Fair Notice/Warning Denial Contrary To BOUIE v. CITY OF COLUMBIA, 378 US 437(1964); RABE v. WASHINGTON, 405 US 313(1972); DOUGLAS v. BUDER, 412 US 430(1973); STOCNER v. CALIFORNIA, 123 S.Ct 2446(2003); WEAVER v. GRAHAM, 450 U.S. 24, 30(1981) By Novel Retrospective Judicial Statutory Interpretation Operating Like An Supporting FACTS (state briefly without citing cases or law) Ex Post Facto Clause Violation.

Petitioner incorporates herein by reference 01-P-1792 brief and ALOFAR pages 3,14-17 concerning MGL c.127, § 129 & §49 being first given the novel interpretation that the words "confined in a correctional institution" meaning the direct opposite outside of a Boston-Suffolk County halfway house that was privately operated, in the September 18, 1985 decision in NIMBLETT v. COMMISSIONER, 20 Mass App Ct 988, 989, six months after Petitioner's March 7, 1985 Woburn-Middlesex County offenses, with Respondents retrospectively applying Nimblett's more onerous change of law to take 3,000 days § 129 good-time without fair notice or warning of aggravated location of offense punishment. The only pre-3/7/85 decision interpreting § 129 previously held that good-time could be denied only "for an offense committed in prison", AMADO v. SUPERINTENDENT, 366 Mass 45, 47-49(1974) not outside of prison.

12B) Ground two: EX POST FACTO CLAUSE VIOLATION BY APPLYING NEW GUIDELINES CONTRARY TO MILLER v. FLORIDA, 482 US 423(1987)(And Its' Progeny)

Supporting FACTS (state briefly without citing cases or law) As set out in 02-P-20 brief and ALOFAR page 49, and appendix II:390-391, incorporated herein by reference, a Middlesex Superior Court Judge, Hiller B. Zobel, retrospectively applied the more onerous 1995 new sentencing commission guidelines to the March 7, 1985 offenses in Petitioner's case, rather than the proper former Superior Court sentencing guidelines applicable in March 1985 (which shall be filed pursuant to Rule 7 of the rules governing habeas corpus cases after Rule 6 discovery with Rule 5 filing of transcripts for 12/13/99, 1/19/00, 3/14/00, 5/9/00, 8/24/00, 9/27/00 and 11/10/00). The state Court made on this ground which is now subject to federal de novo review, and not subject to 28 USC § 2254(d)(1) deference, id.

12C) GROUND THREE: STATE VIOLATING PETITIONER'S EQUAL PROTECTION CLAUSE RIGHT TO SAME INDICTMENT PROCEDURES AFFORDED ALL OTHERS FOR ANY AGGRAVATED "INFAMOUS PUNISHMENT" OFFENSE ELEMENT:

SUPPORTING FACTS: As set out in 01-P-1792 brief and ALOFAR pages 4-6,30-41 (with appendix documents cited therein) and 02-P-20 brief and ALOFAR pages 45-46, incorporated herein by reference, the state denied Petitioner his Equal Protection Clause right to presentment of sufficient evidence on each and every element of an aggravated offense to a grand jury (see April 3,1985 grand jury transcript in appendix I:28-80 omitting evidence of prior lawful sentence being served in any correctional institution) and right to indictment that contained c. 127,§ 129 (with c. 127, §§ 48,49) elements for 3,000 days aggravated punishment offense,for which the state holds Petitioner in Walpole State Prison ("infamous punishment" proscribed by Massachusetts Article XII unless prior indictment and trial by jury,or trial waiver took place). 199 years of Supreme Judicial Court decisions (1904 thru 2003) require presentment to a grand jury and elements contained in the indictment for all Massachusetts aggravated Walpole State Prison "infamous punishment" offenses. Contrast appendix I:27 Middlesex indictment number 85-987.

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n.1/ No 28 USC § 2254(d)(1)(2) and § 2254(e)(1) deference or presumption of correctness applies to any state findings, ELLSWORTH V. WARDEN,333 F3d 1, 4 (1st Cir en banc 2003);EPSOM V. HALL,330 F3d 49,52-53 (1st Cir 2003);FORTINI V. MURPHY, 257 F3d 39, 47 n.5 (1st Cir 2001) because neither the state Superior Court, nor the Massachusetts Appeals Court, nor the Supreme Judicial Court decided this absence of aggravated offense indictment element issue,BUNDY V. WILSON,815 F2d 125, 133 (1st Cir 1987) ("Due process thus prohibits the (state) Court(s) from arbitrarily and capriciously deciding to decline to consider (Petitioners') claim(s)").

12D) GROUND FOUR: STATE ENHANCING "INFAMOUS PUNISHMENT" BASED ON A PRIOR VACATED, VOID, UNCONSTITUTIONAL CONVICTION, CONTRARY TO JOHNSON V. MISSISSIPPI, 486 US 578, 586(1988); MELENG V. COOK, 490 US 488, 492(1989); UNITED STATES V. TUCKER, 404 US 443, 445-448(1972); SULLIVAN V. LOUISIANA, 508 US 275, 280-282(1993) n.2:/

SUPPORTING FACTS: As set out in 01-P-1792 brief and ALOFAR pages 4-9, 30, 37-38, 41, 47-48, Appendix records cited therein, and rehearing petition, the state Department of Correction agency with unlawful Court approval imposed c.127, § 129 3,000 day aggravated Walpole State Prison "infamous punishment" based upon a prior 1971 vacated void and unconstitutional conviction; refusing to recognize U.S. Supreme Court and First Circuit decisions which precluded the use of a vacated conviction to enhance a sentence; and, refusing to recognize a US Supreme Court decision making the 1971 conviction a nullity [based on unconstitutional preponderance of the evidence, proof beyond the purchase of a refrigerator burden of proof jury instruction, Appendix III:567]. In addition, the 1971 case void conviction sentence (actually resentence became only valid sentence) was known by Respondents to have expired (resentencing known at time of good time taking decision by DOC agency) on January 26, 1985 which was forty days prior to the March 7, 1985 Commonwealth v. DuPont Middlesex No. 85-987 offense, with a certificate of discharge issued by the DOC Commissioner effective 1/26/85; which, at the time of c.127, § 129 3,000 days good-time taking precluded any factual finding of lawful imprisonment as of March 7, 1985, id.

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n.2/ In addition to the actual innocence of predicate vacated conviction exception precluding sentence enhancement, which is now being considered in DRETKE V. HALEY, certiorari granted 124 S.Ct 385-386 (October 14, 2003) from HALEY V. COCKRELL, 306 F3d 257 (5th Cir 2002) local Federal Court precedent that was ignored by all Massachusetts state Courts included DOMEGAN V. UNITED STATES, 703 F.Supp 166, 169-170 (D.Mass 1989); UNITED STATES V. PALEO, 871 F.Dupp 60 (D.Mass 1994) relief affirmed 47 F3d 1156 (1st Cir 1994); UNITED STATES V. PAYNE, 894 F.Supp 534 (D.Mass 1995); UNITED STATES V. PETTIFORD, 101 F3d 199, 201-202 (1st Cir 1996); MATEO V. UNITED STATES, 276 F.Supp2d 186, 189-196 (D.Mass 2003); UNITED STATES V. MEJIA, 278 F.Supp2d 55, 63 (D.Mass 2003).

12E) GROUND FIVE: DOC AND STATE COURT RULINGS CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, FIORE V. WHITE, 528 US 23, 25-30(1999); SKINNER V. OKLAHOMA, 316 US 535, 541(1942); JACKSON V. INDIANA, 406 US 715, 723-730(1972) VIOLATING THE SIMILARLY SITUATED n.3/PETITIONERS' EQUAL PROTECTION CLAUSE ENTITLEMENT TO 3,000 DAYS LYNCH, PETITIONER MGL c.127, § 129 GOOD-TIME, WHEN STATE, WITHOUT ANY RATIONAL JUSTIFICATION, REFUSED TO RECOGNIZE, CONSIDER AND DECIDE HIS TWIN LYNCH "SPECIAL CIRCUMSTANCES" n.4/ AND DO LYNCH ANALYSIS:

SUPPORTING FACTS: As set out in 01-P-1792 brief & ALOFAR pages 6-13, 41-48; 02-P-20 brief & ALOFAR pages 45-46, with record appendix/transcript citation facts and rehearing petitions, incorporated herein, Petitioner DuPont had twin-LYNCH, PETITIONER special circumstances arising from an unconstitutional 1971 conviction [for which viod & vacated 15 to 30 year sentence caused Petitioner to unlawfully serve three years more than he should have for his first parole, in light of the only valid 10 to 18 year sentence] which expired forty (40) days prior to the March 7, 1985 offense in this case [which also followed 8½ months unlawful confinement] related to an unconstitutional 1984 parole revocation; but, without any legitimate rational basis, the DOC and State Courts refused to afford Petitioner equal protection/application of LYNCH, PETITIONER, 379 Mass 757(1980) law which required him retaining 3,000 days c.127, § 129 good-time under a proper LYNCH decision analysis he was denied, id.

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n.3/De Novo review is appropriate on the "similarly situated" portion of the Equal Protection Clause analysis because "neither of the state courts below reached this prong of the...analysis" WIGGINS V. SMITH, 123 S.Ct 2527, 2542(2003). Petitioner met such requirements, CARILLO V. DUBOIS, 23 F.Supp2d 103(D.Mass 1998) and he properly asserted his right as a "class of one", VILLAGE OF WILLOWBROOK V. OLECH, 528 US 562, 564-566(2000).

n.4/No 28 USC § 2254(d)(1)(2) and § 2254(e)(1) defference is due state Superior and Appeals Court decisions ignoring entirely the unconstitutional 1984 parole revocation ground. See MORRISSEY V. BREWER, 408 US 471, 482, 488-489(1972) and footnote 1, supra. An evidentiary hearing is necessary under Rule 8, of the rule governing 28 USC § 2254 cases, on this issue following Rule 6 discovery and a Rule 7 expanded record, to fully develop parole revocation hearing unconstitutional procedures and inadequate flawed findings.

12F) GROUND SIX: STATE DEPRIVATION OF PETITIONER'S FUNDAMENTAL RIGHT TO SOME KIND OF DUE PROCESS HEARING OR JURY TRIAL PROOF BEYOND A REASONABLE DOUBT [or Waiver Thereof Properly] NECESSARY TO RESOLVE HIGHLY DISPUTED 3/7/85 UNLAWFUL, OR LAWFUL IMPRISONMENT FACTS WHICH WERE NOT PROVEN BEYOND A REASONABLE DOUBT IN COURT, WHILE STATE COURT'S RULED CONTRARY TO APPRENDI V. NEW JERSEY, 530 US 466(2000); PROGENY BLAKELY V. WASHINGTON, 124 S.Ct (2004); FIORE V. WHITE, 531 US 225(2001); GOLDBERG V. KELLY, 397 US 264(1970); FUENTES V. SHEVIN, 407 US 67,80-84(1972); WOLFF V. McDONNELL, 418 US 539,557-558(1974); GOSS V. LOPEZ, 419 US 565,579-581(1975); MEMPHIS GAS & WATER DIVISION V. CRAFT, 426 US 1,18(1978); PARHAM V. J.R., 442 US 584,606-607(1979); CLEVELAND BOARD OF EDUCATION V. LOUDERMILL, 470 US 532,542(1985); ZINERMON V. BIRCH, 494 US 113, 127-128(1990); UNITED STATES V. GAUDIN, 515 US 506,509-510(1995); JACKSON V. VIRGINIA, 443 US 307,315(1979);

SUPPORTING FACTS: As set out in 01-P-1792 brief and ALOFAR pages 4-9,18-41, rehearing petition and motion for reconsideration in light of certiorari granted in BLAKELY V. WASHINGTON, 124 S.Ct 429(2003), the state courts and Department of Correction Agency, in an ex parte post-November 10,2000 resentencing posture, unlawfully imposed 3,000 days (more than 8 years) aggravated punishment without any form of hearing or proof beyond a reasonable doubt on the MGL c.127,§ 129 elements and interrelated c.127,§ 48,49 elements.

Petitioner's 1971 Worcester County 10 to 18 year armed robbery sentence expired on January 26,1985 following a decision holding 1971 Worcester trial jury instructions contained a clearing unconstitutional burden of proof(state appendix III:567) requiring that prior void conviction and sentence to be vacated by Superior Court Judge Robert Mulkern who ordered a new trial(III:596)

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n.5/The state Appeals Court falsely stating there was no dispute in lawful imprisonment and offense location facts was not supported by anything in the record and directly contradicted by clear and convincing evidentiary record facts, 28 USC § 2254(e)(1), resulting in a state court decision based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceedings" 28 USC § 2254(d)(2), HILL V. MALONEY, 927 F2d 646,655 (1st Cir 1990) ("We think it incorrect to conclude that the issue was not in dispute"); QUBER V. GUARINO, 293 F3d 19,33-35(1st Cir 2002), and the First Circuit refuses to treat as undisputed any fact in the absence of a concession by a criminal defendant, UNITED STATES V. RIVERA, 872 F2d 507,512(1st Cir 1989); UNITED STATES V. GARCIA-ROSA, 876 F2d 109,224 n.12(1st Cir 1989). A certiorari petition on this ground was filed on April 26,2004, DuPont V. Maloney, Commissioner of Massachusetts Department of Correction, Supreme Court number 03-10227

with the prosecutors' assent(III:594-595). This caused expiration of that sentence forty days prior to new March 7,1985 Middlesex County armed robbery offense challenged in this 28 USC § 2254 petition.

Commonwealth v. DuPont Middlesex Indictment No.85-987 named Petitioner DuPont as a resident of Woburn Massachusetts(state appendix I:27) not naming him as being confined in any Suffolk County Department of Correction Institution/Prison/Halfway House,id. This was because no evidence of imprisonment was presented to the April 1985 grand jury(I:28-80 transcript of grand jury proceedings). The December 13,1999 guilty plea factual basis did not mention c.127, § 129 lawful imprisonment aggravated punishment element and only described City of Woburn,Middlesex County offense facts taking place outside a correctional facility(12/13/99 Tr.pages 59-74), not Suffolk County 577 Massachusetts Avenue Halfway House facts while custody facts were highly disputed in criminal and state habeas proceedings.

Neither the state prosecutors,or DOC counsel,filed any mittimus proof of prior lawful sentence,nor was c.127,§ 48 Commissioners approval of MHHI(Mass.Halfway Houses. Inc.),nor c.127, § 49 Correctional Officer supervision at such halfway house proven in either or the state court proceedings,nor could it have been proven because there was no DOC Officer staffing or supervision at 577 House(I:209-210) and a Worcester C-Pac State Police Trooper Duffy 4/1/85 (investigation of 3/7/85 crimes) report in Respondent's files stated: "the 577 House is a division of the Massachusetts Halfway House Incorporated which is owned/operated by one Brian Riley...supervision of their(DuPont/Coakley) activities was non-existant and actually a perfect ruse for criminal acts"(I:214) n.9

Respondent's denial of any kind of a hearing,or the denial of trial by jury proof beyond a reasonable doubt [or proper waiver thereof] and complete failure to prove c.127,§ 129 lawful imprisonment element; c.127,§ 48 Commissioner's approval of MHHI; c.127,§ 49 Correctional Officer supervision at such halfwayhouse, aggravated punishment elements were highly contested court facts.

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n.6/An evidentiary hearing,pursuant to Rule 8 of the rules governing 28 USC § 2254 cases, is necessary to fully develop the facts,
ELLSWORTH v. WARDEN,333 F3d 1,9(1st Cir en banc 2003)(Torruella,CJ)
with Rule 6 production of escape/out-of-place disciplinary records
related to 3/7/85 offense and Trooper Duffy investigation reports
for Rule 7 expansion of habeas corpus proceeding record.Also see
HAYGOOD v. YOUNGER,769 F2d 1350,1354-1359(9th Cir en banc 1985)

12G) GROUND SEVEN: STATE COURTS RULING CONTRARY TO, OR AN UNREASONABLE APPLICATION OF BALDWIN V. HALE, 1 Wall 223, 233, 17 L.Ed 531(1864); HODGSON V. VERMONT, 168 US 262, 269(1897); COLE V. ARKANSAS, 333 US 196, 200-201(1948); IN RE OLIVER, 333 US 257, 273(1948); ARMSTRONG V. MANZO, 380 US 545, 549-550(1965); PRESNELL V. GEORGIA, 439 US 14, 16 n.3 (1978); DUNN V. UNITED STATES, 442 US 100, 103-113(1979); n.7/ LANKFORD V. IDAHO, 500 US 110, 119, 128 n.23(1991) CONCERNING THE DEPRIVATION OF PRE-12/13/99 FAIR NOTICE OF SURPRISE THEORY OF AGGRAVATED c.127, § 129 OFFENSE ELEMENT:

SUPPORTING FACTS: As set out in 01-P-1792 brief and ALOFAR pages 4-6, 18-29, and 02-P-20 brief and ALOFAR pages 45-46, with both appeals rehearing petitions, incorporated herein by reference; Petitioner DuPont was denied fair notice of a c.127, § 129 surprise aggravated offense element theory prior to and during his December 13, 1999 guilty plea. Such element of commission of armed robbery while confined in a correctional institution, during a lawful term of imprisonment, was not contained in Commonwealth v. DuPont April 1995 Middlesex County grand jury evidence transcript (01-P-1792 state appendix I:28-80), nor in the indictment itself which listed Petitioner as a resident of Woburn, not a resident of 577 Mass Avenue Boston halfway-house(I:27) and Superior Court Judge Hiller B. Zobel ruled in Petitioner's favor on the point:

"THE COURT: As an initial proposition I would tend to believe that once a sentence, once there has been a reversal, that the whole matter is wiped.

MR. O'REILLY: Well Your Honor, --

THE COURT: He can't be serving a sentence on an offense of which you haven't yet been tried."

(12/13/99 Transcript page 27)

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n.7/Accord, SHEPPARD V. REES, 909 F2d 1234, 1237-1238(9th Cir 1989); TARPLEY V. ESTELLE, 703 F2d 157, 160-161(5th Cir 1983); COLA V. REARDON, SHERIFF ESSEX COUNTY, 787 F2d 681(1st Cir 1986) issue now pending before Magistrate-Judge Dein in KILBURN V. MALONEY, 98-12156-RGS and the "lack of fair notice of the charges against a defendant is a structural error that cannot be analyzed under the harmless error analysis", UNITED STATES V. BROWN, 295 F3d 152, 155 n.5(1st Cir 2002)citing UNITED STATES V. MURPHY, 762 F2d 1151, 1155(1st Cir 1985). A petition for a writ of certiorari on this Ground was filed on April 26, 2004, DuPont V. Maloney, Commissioner Of Massachusetts Department of Correction Supreme Court number 03-10227, id.

12H) GROUND EIGHT: STATE COURT RULINGS CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, BOYKIN V. ALABAMA, 395 US 238 (1969); BRADY V. UNITED STATES, 397 US 742, 748-755 (1969); HENDERSON V. MORGAN, 426 US 637, 645-646 (1976); LANKFORD V. IDAHO, 500 US 110, 114-128 (1991); RALEY V. OHIO, 360 US 423, 438 (1959) CONCERNING JUDICIAL n.8/ MISLEADING AS TO ENTITLEMENT TO GOOD-TIME SCENERIO BASED ON VOID 1971 VACATED CONVICTION, JUST PRIOR TO 12/13/99 GUILTY PLEA COLLOQUY, WITH COLLOQUY OMISSION OF c.127, § 129 3,000 DAY AGGRAVATED PUNISHMENT ELEMENT AND ELEMENT FACTUAL BASIS, WHICH RENDERED PLEA UNKNOWNING, UNINTENTIONALLY ENTERRED INTO AND INVOLUNTARY:

SUPPORTING FACTS: As set out in 01-P-1792 brief and ALOFAR pages 5, 28-30, incorporated into 02-P-20 brief and ALOFAR pages 45-46, rehearing petitions and appendix/transcriptrecords cited therein, incorporated herein by reference, state trial judge Hiller Zobel failed to give Petitioner notice of MGL c.127, § 129 3,000 day aggravated punishment element (for which there was no factual basis) and affirmative mislead Petitioner that § 129 would not apply when the Court made the following presumptively correct factual finding:

"THE COURT: As an initial proposition I would tend to believe that once a sentence, once there has been a reversal, that the whole matter is wiped.

MR.O'REILLY: Well Your Honor, --

THE COURT: He can't be serving a sentence on an offense of which you haven't yet been tried."

(12/13/99 transcript page 27)

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n.8/Because the 12/13/99 transcript conclusively shows Judge Hiller Zobel "failed to ascertain that (the Petitioner) had knowledge of the (c.127, § 129) element...Nothing more need be shown to establish the inadequacy of the colloquy", COMMONWEALTH V. BARRY, 742 NE2d 584, 585 (2001) (citing Hendersn V. Morgan); COMMONWEALTH V. NIKAS, 727 NE2d 1166, 1169-1172 (2000), the misleading good-time ruling by the Court, MOORE V. BRYANT, 348 F3d 238, 240-244 (7th Cir 2003) that resulted in almost twice as much time in prison, BEAVERS V. SAFLLE, 216 F3d 918, 925-926 (10th Cir 2000) combined with Mass.Crim.P. Rule 12(c)(3)(B) failure to warn of such no-good-time mandatory sentence direct consequence, COLEMAN V. ALABAMA, 827 F2d 1469, 1472-1475 (11th Cir 1987); US EX REL PEEWORTH V. CONTE, 480 F2d 266, 267-268 (9th Cir 1974); PEOPLE V. EISENBERG, 440 NE2d 259, 260 (Ill 1982); PEOPLE V. MAPPS, 555 NE2d 1275, 1276-1277 (Ill 1990); UNITED STATES V. McCANN, 940 F2d 1352, 1358 (10th Cir 1991) renderred the plea unknowing, unintelligently entered into and involuntary. An early summer 2004 habeas corpus bail release motion shall be filed on these undisputedly meritorious 100% winning record verified legal grounds, id.

The state Appeals Court did not overturn this Superior Court factual finding or address the merits of the claim of Judicial misleading in Commonwealth V. DuPont 02-P-20 but the same appellate panel of judges was aware of Judge Zobel's finding that it had placed in West Key #2 of DuPont V. Commissioner, 794 NE2d 1254,1255(2003)(01-P-1792).

The December 13,1999 plea colloquy factual basis (transcript pages 59-74) did not include any factual basis for MGL c.127,§ 129 aggravated punishment element which was not explained during the guilty plea hearing(Tr.pages 4-82).Petitioner was mislead into believing he would receive 3,000 days § 129 good-time based on Judge Zobel's ruling(Tr.page 27) just prior to the plea and the Petitioner definately would not have plead guilty absent such judicial misleading(see pro se Crim.Rules 12,30 Motion To Withdraw Plea,or for Specific Performance filed for 5/9/00 hearing,as well as subsequently assigned resentencing counsel's plea withdrawl motions and Petitioner DuPont's supporting affidavit,with 5/9/00, 8/24/00,9/27/00,11/10/00 transcripts and state appendix cited in 02-P-20 brief pages 45-46) which also resulted in confusion for the Court, the state Prosecutor and resentencing counsel,id.(see Atty John Swomley transcript comment that if the lawyers and judge can't figure out whether,or not, § 129 good-time entitlement existed or would be forfeited, how could a pro se defendant know ?).

Without knowledge or direct consequence of whether, or not, 3,000 days (more than 8 years) aggravated punishment would, or would not, be imposed, and without plea colloquy factual basis for enhancement or § 129 element notice (or waiver thereof), Petitioner's plea was unknowing,unintentionally entered into and involuntary, as a matter of Federal Constitutional Law (which state Court refused to recognize or follow).

12I) GROUND NINE: STATE COURT RULINGS CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, HILL V. LOCKHART, 474 US 52, 56-60(1985); TOLLETT V. HENDERSON, 411 US 258, 266-269(1973); NORTH CAROLINA V. ALFORD, 400 US 25, 31(1970); UNITED STATES V. JACKSON, 390 US 570, 583-591(1968); LANKFORD V. IDAHO, 500 US 110, 114-128(1991) CONCERNING THE STATE SANDBAGGING AND CONCEALING A PAROLE VIOLATION WARRANT FOR CONSECUTIVE SERVICE OF 3 YEARS AND 4 MONTHS DURING THE TIME PERIOD WHEN HEPATITIS "C" MEDICAL TREATMENT WAS READILY AVAILABLE IN COMMUNITY BUT DENIED IN JAIL AND JUDGE HILLER ZOBEL MADE MISLEADING IMMEDIATE RELEASE ADVICE AND RECOMMENDATIONS, COMPOUNDING GROUND EIGHT,SUPRA, AND GROUNDS TEN AND ELEVEN,INFRA, PREJUDICE, RENDERING GUILTY PLEA UNKNOWNING, UNINTENTIONALLY ENTERED INTO, COERCED AND INVOLUNTARY; OR, MASS. PAROLE BOARD WAIVED JURISDICTION:

SUPPORTING FACTS: As set out in 01-P-1792 brief and ALOFAR pages 13, 48-50; and 02-P-20 brief and ALOFAR pages 21-34, 41-43, 45-48, rehearing Petitions and appendix/transcript citations contained in such briefs/ALOFAR's, incorporated herein by reference, the state sandbagged and concealed parole violation warrant #w/38655, or the Mass. Parole Board waived jurisdiction, as part of misleading immediate release recommendations made by Judge Hiller Zobel, during the time period when Hepatitis "C" medical treatment was readily available in the community but totally denied in jail, as noted at 1/19/00, 3/14/00 sentencing hearings and 5/9/00, 8/24/00, 9/27/00 and 11/10/00 resentencing hearings, making the 12/13/99 guilty plea unknowing, unintelligently entered into, involuntary (and perhaps coerced to extent medical release was necessary motivating factor). Petitioner would not have plead guilty if he had been given notice of 3 year, 4 month w/38655 parole violation detainer (which had been previously withdrawn).

Judge Zobel's immediate release recommendations 8/3/99 transcript pages 9, 22; 9/29/99 Tr. page 12; 12/13/99 Tr. pages 26-30) misleading advice to petitioner exacerbated the Respondent's sandbagging concealment of w/38655 parole violation warrant; while this would not have occurred if the state had not erroneously denied guilty plea counsel, without a waiver of counsel, as set out in Ground Ten, infra, also applicable to Ground Eight, supra, interrelated habeas corpus Grounds, id.

12J) GROUND TEN: STATE COURT RULINGS CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, IOWA V. TOVAR, 124 S.Ct 1379 (March 8, 2004); UNITED STATES V. VONN, 535 US 55 (2002); PATTERSON V. ILLINOIS, 487 US 285, 292-300(1988); MICHIGAN V. JACKSON, 475 US 625, 629-630(1986); MIRANDA V. ARIZONA, 384 US 436, 483-499(1966); WHITE V. MARYLAND, 373 US 59, 60(1963); RICE V. OLSEN, 324 US 786, 788-792 (1945); JOHNSON V. ZERBST, 304 US 458, 464(1938) CONCERNING PETITIONER NOT BEING AFFORDED NOTICE OF HIS RIGHT TO PLEA, SENTENCING OR RETRIAL COUNSEL DURING THE 12/13/99 GUILTY PLEA COLLOQUY, WHICH RENDERED IT UNKNOWING, UNINTENTIONALLY ENTERRED INTO AND INVOLUNTARY n.9/, IN COMBINATION WITH PREJUDICE FROM GROUNDS EIGHT AND NINE, SUPRA, FOR WHICH A RULE 8 EVIDENTIARY HEARING IS NECESSARY:

SUPPORTING FACTS: As set out in 02-P-20 brief and ALOFAR pages 33, 45-46; 01-P-1792 brief and ALOFAR page 50, incorporated herein, with appendix citations and entire December 13, 1999 plea transcript pages 4 thru 82 colloquy, show Petitioner was never informed of his right to be counselled regarding his plea, or right to plea, sentencing or retrial counsel (see all prior 1998-1999 transcripts). Prejudice accrued when the Prosecutor, Judge Hiller B(iPolar) Zobel, the DOC Legal Department and even resentencing counsel became confused with disputed 3,000 days good-time and a concealed parole violation detainer. An assigned Attorney was necessary to counsel Petitioner about these matters in relation to the guilty plea which he would not have entered into had counsel been assigned disclosing the P/V detainer and loss of 3,000 days good-time before any plea [which distinguished this case from the IOWA V. TOVAR case].

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n.9/ An application for reconsideration of ALOFAR #13844 by the Supreme Judicial Court, based on Iowa V. Tovar, on March 29, 2004, was filed and a certiorari petition based on this Ground was filed on April 23, 2004 in DuPont V. Massachusetts Supreme Court number 03-10062. Prejudice from lack of counsel notice and denial of guilty plea counsel, without any waiver of counsel, is shown by both the complex and confusing goodtime issue, MOORE V. BRYANT, 348 F3d 238, 240 (7th Cir 2003) and the sandbagged/concealed parole violation warrant, WATTS V. BREWER, 340 F.Supp 378, 379-383 (SD Iowa 1972).

A habeas rule 5 order for all 1998-1999 pre-plea, and 2000 post-plea transcripts is necessary to show absolutely no waiver colloquy, no waiver by misconduct, and no legitimate reason for the state denial of retrial and plea counsel, id.

12K) GROUND ELEVEN: STATE COURT DECISIONS CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, JOHNSON V. ZERBST, 304 US 458, 464(1938)EX PARTE HULL, 312 US 546,547-549(1941); WATTS V. INDIANA, 338 US 49,52-55(1949); GRIFFIN V. ILLINOIS, 351 US 12,14-20(1956); UNITED STATES V. JACKSON, 390 US 570,583-591 (1968); GARDNER V. CALIFORNIA, 393 US 367,370-371(1969); BROOKS V. FLORIDA, 389 US 413,414-415(1967); JOHNSON V. AVERY, 393 US 483(1969); WOLFF V. McDONNELL, 418 US 539(1974); BOUNDS V. SMITH, 430 US 817(1977); ARIZONA V. FULMINANTE, 499 US 279, 286-288(1991); SANDIN V. CONNER, 515 US 472(1995); LEWIS V. CASEY, 518 US 343(1996) AND THEIR PROGENY, CONCERNING THE PETITIONERS' INVOLUNTARY GUILTY PLEA BEING COERCED n.10/BY MEANS OF 100 DAYS IN A STRIP-CELL DENIED TRANSCRIPTS, LEGAL FILES, LAW LIBRARY ACCESS, LEGAL TELEPHONE CALLS NECESSARY TO PREPARE RETRIAL DEFENSE, DURING FIFTEEN MONTHS UNCONSTITUTIONAL WALPOLE STATE PRISON SEGREGATION LIMITING LAW LIBRARY, LEGAL FILE, TELEPHONE ACCESS, DENIED HEPATITIS "C" MEDICATAL TREATMENT FOR SIX YEARS DURING 8½ YEARS SEGREGATION:

SUPPORTING FACTS: As set out in 02-P-20 brief and ALOFAR pages 21-34, 41-43, 46-48, with all appendix/transcript citations therein, incorporated herein by reference, Petitioner's plea was coerced.

Petitioner was unlawfully held as a pre-trial detainee in Walpole State Prison segregation for fifteen months (9/29/98 thru 12/10/99) in violation of Superior Court Judge Paul Chernoff's 10/7/98 orders, without 103 CMR 421.09 thru 103 CMR 421.18 due process procedural protections, HAVERTY V. COMMISSIONER, 776 NE2d 973; 437 Mass 737(2002), breaching DuPont Fair, 89-105-B consent decree contract (mandatory language that creates "Liberty Interest" with conditions of segregation) and breaching CEPULONIS V. FAIR, 78-3233-Z class consent decree, within a total of eight and one-half years (1991-1999) overall unlawful segregation(subject to judicial notice of 92-12420-RCL,

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n.10/A habeas Rule 8 evidentiary hearing is necessary to fully develop the record, COMER V. STEWART, 215 F3d 910,916 (9th Cir 2000); JONES V. STEWART, 231 F3d 1248,1252(9th Cir 2000); LaRUE V. FAIRMAN, 780 F.Supp 1190,1194-1195(ND Ill 1991); TATE V. WOOD, 963 F2d 20,26(2nd Cir 1992); VALVERDE V. STINSON, 224 F3d 129,135-137(2nd Cir 2000); BUFFALO V. SUNN, 845 F2d 1158, 1164-1166(9th Cir 1988) and Judge Lindsay is reminded of his 2/20/03 phrase identifying Petitioner as "THE POSTER BOY FOR DENIAL OF COURT ACCESS", which shall be proven true in these habeas corpus proceedings,id.

97-11087-RCL and 98-10309-RCL civil rights litigation pending before Judge Reginald C. Lindsay and also see summary judgment decision of 6/1/04 approving 97-11087-RCL six year denial of Hepatitis "C" claim for upcomming jury trial).

From September 29,1998 thru September 1,1999 Petitioner was denied Attorney calls,limited to 1½-2 hours law library access most weeks(and denied other weeks) violating Cepulonis consent decree;as well as substantially denied access to his seized/stored criminal case discovery/motion files and prior trial transcript.No legal files or transcript were transferred to County jail when the Petitioner was moved there the weekend before trial/plea(12/10-13/99).

For one-hundred days before scheduled trial/plea, between September 1,1999 thru December 10,1999,Petitioner was unlawfully held 24 hours per day in a strip-cell under outrageous coercive conditions,totally denied law library access,legal file access,transcript from prior trial access,denied all telephone calls and tools necessary to prepare a trial defense(exacerbated by Court denial of defense investigator and defense experts),while Petitioner was lawfully protesting six years denial of treatment for Hepatitis "C",constructively denied counsel.This presented Petitioner with "Hobson's choice" between Judge Zobel's recommendation for immediate release guilty plea(to obtain Hepatitis "C" necessary medical treatment) or certain conviction unprepared for a trial the state obstructed all defense preporation for,making the 12/13/99 guilty plea unknowing,unintelligently entered into, coerced and involuntarily. An evidentiary hearing was properly requested and denied by the state Superior and Appeals Courts.Hence, Petitioner requests Habeas Rule 8(c) assignment of counsel to fully develop the facts of coercion at a federal evidentiary hearing.

12L) GROUND TWELVE: STATE SUPERIOR COURT JUDGE HILLER ZOBEL PERSONALLY RECOMMENDING AND NEGOTIATING AN IMMEDIATE n.11/ RELEASE GUILTY PLEA, ZOBEL'S DOUBLE PUNISHMENT BREACH OF THE PLEA AGREEMENT CONTRACT WITHOUT AFFORDING PROMISED OPPORTUNITY TO WITHDRAW, AND STATE COURT RULINGS CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, SANTOBELLO V. NEW YORK, 404 US 257, 263(1971 n.12/ DENYING PETITIONERS' RIGHT TO RESENTENCING BY A DIFFERENT JUDGE OR PLEA WITHDRAWL:

SUPPORTING FACTS: As set out in 02-P-20 brief and ALOFAR pages 46-48, with appendix/transcript citations therein, incorporated herein by reference, State Superior Court Judge Hiller B. Zobel personally negotiated (also see coercion Grounds Nine and Eleven, incorporated herein as relevant) Petitioner's guilty plea using coercive means, followed by Zobel breaching his own plea contract express clause and implied covenant of good-faith and fair dealing by imposing a sentence twice the maximum that Zobel negotiated; followed by Zobel refusing to comply with Santobello specific performance requirement of resentencing by a different judge, id.

The 02-P-20 Appeals Court panel decision made presumptively correct findings that Zobel negotiated the guilty plea [see SPENCE V. SUPERINTENDENT, 219 F3d 162, 168 (2nd Cir 2000)

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n.11/The tapes for 8/3/99, 9/29/99 and 12/13/99 hearings (and other hearings) must be produced, pursuant to habeas Rule 6 for Rule 7 expansion of corrected record, or a Rule 8 evidentiary reconstruction hearing is necessary, id.

n.12/Accord, MAWSON V. UNITED STATES, 463 F2d 29, 31 (1st Cir 1972) ("It is difficult for a judge, having once made up his mind, to resentence a defendant"); UNITED STATES V. KERKULER, 918 F2d 295, 300 (1st Cir 1990) ("This Court has repeatedly expressed a preference for specific performance of the agreement by ressentencing before a different judge"); UNITED STATES V. MERCEDES-AMPERO, 980 F2d 17, 19 (1st Cir 1992); UNITED STATES V. CLARK, 55 F3d 9, 14 (1st Cir 1995); UNITED STATES V. VELEZ-CARRERO, 77 F3d 11, 12 (1st Cir 1996) ("Santobello... requires that the breach of a plea agreement be remedied... by specific performance of the agreement on the plea in which case petitioner should be resentenced by a different judge").

("Any promise made by the Judge in the course of the colloquy operates as a promise made by the state"), but the panel ruled on the merits of this Ground Twelve issue in square conflict with Santobello when it held that "the defendant's claim that he is entitled to an evidentiary hearing and resentencing by another judge are without merit"; id., (panel decision 02-P-20 pages 5-6).

The record fully supports presumtively correct findings that Zobel personally negotiated the guilty plea contract (7/1/99 Tr. pages 5-9; 8/3/99 Tr. pages 13-20; 9/29/99 Tr. pages 12-15 and 12/13/99 Tr. pages 23-36, 53, 77) while Judge Zobel personally recommended time served release (9/29/99 Tr. page 12; 8/3/99 Tr. page 19-page 22 reconstruction) while repeatedly focusing on the bottom of the 160 to 240 month sentencing guideline range (8/3/99 Tr. page 19; 12/13/99 page 30) when Petitioner already served 177 months, id.

On March 14, 2000 Judge Zobel breached the express plea agreement contract not to exceed 240 months (without opportunity to withdraw plea first) and refusing to consider lower end of 160 to 240 month range implied covenant of good-faith and fair dealing breach occurred when Zobel imposed a 360 to 480 month sentence (see 3/14/00 transcript); then when that sentence was vacated on May 9, 2000 and during 8/24/00, 9/27/00, 11/10/00 resentencing hearings, Zobel refused to comply with Santobello requirement for resentencing by a different judge (see 5/9/00, 8/24/00, 9/27/00 and 11/10/00 transcripts and withdrawl motions), finally followed by Zobel's refusing to consider lower end of 160 to 240 month range on Novemer 10, 2000 when he breached 240 month maximum plea agreement by imposing a 20 year to 20 years and one day excessive sentence, id.

12M) GROUND THIRTEEN: STATE COURT RULINGS CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, WILLIAMS V. KAISER, 323 US 471, 474-479(1945); VON MOLTKE V. GILLIES, 332 US 708, 723-724(1948); CARNLEY V. COCHRAN 369 US 506, 516-517(1962); FARETTA V. CALIFORNIA, 422 US 806, 835(1975); PENSION V. OHIO, 488 US 75, 83(1988); ALABAMA V. SHELTON, 122 S.Ct 1764, 1770(2002); IOWA V. TOVAR, 124 S.Ct./~~329~~ (3/8/04) WITH RESPECT TO DENIAL OF 1998-1999 PRE-TRIAL COUNSEL, PLEA AND 1/19/00-1/20/00, 3/14/00 SENTENCING COUNSEL, WITHOUT A WAIVER OF COUNSEL OR ANY n.13/ WAIVER COLLOQUY WARNINGS, WHEN SUCH DENIAL WAS BASED ON PETITIONER'S EXERCISING HIS CONSTITUTIONAL RIGHTS TO A FULL DEFENSE PREPARED BY COMPETENT COUNSEL WHO KNEW MASSACHUSETTS LAW:

SUPPORTING FACTS: As set out in 02-P-20 brief and ALOFAR pages 2-17, 21-34, 34-40, 44-46, and rehearing petition, with appendix/transcript citations therein, incorporated herein by reference, the Petitioner was unconstitutionally denied his right to pre-trial (pre-retrial 1998-1999) counsel and first (2000) sentencing counsel, without a waiver of counsel or colloquy warnings. see 02-P-20 presumptively correct factual finding that there was no waiver colloquy or signed waiver of counsel form in record, id. Petitioner being denied counsel was based on his properly requesting (and exercising his constitutional right to) a full retrial defense prepared by a competent Attorney who knew Massachusetts law; followed by lazy and incompetent state of Washington Atty Kern Cleven refusing to get a defense investigator, refusing to file timely necessary motions and refusing to promptly prepare for a speedy retrial (see Atty Cleven letters in state appendix and 4/12/99, 4/20/99, 8/3/99, 9/29/99, 12/6/99, 12/10/99, 12/13/99, 1/19-20/00 and 3/14/00 transcripts). Habeas Rule 8(c) CJA assigned/appointed counsel is requested to fully develop Ground Thirteen record at an evidentiary hearing. -19-

n.13/A habeas rule 8 evidentiary hearing is necessary, RICE V. OLSON, 324 US 786, 787-792(1945); MAYNARD V. MEACHUM, 545 F2d 273, 278-279(1st Cir 1976); GUNTER V. MALONEY, 291 F3d 74, 81(1st Cir 2002); CRAIG V. BETO, 458 F2d 1131, 1136(5th Cir 1972); CRANDELL V. BUNNELL, 25 F3d 754, 755(9th Cir 1994); SNOOK V. WOOD, 89 F3d 605, 613(9th Cir 1996); STROZIER V. NEWSOME, 871 F2d 995, 998-1000(11th Cir 1989).

Such hearing will develop the record concerning prior state assigned counsel's incompetence strongly supporting a finding of no waiver by conduct and a finding that counsel should have been substituted to replace incompetent Atty Kern Cleven.

12N)GROUND FOURTEEN: STATE COURT RULINGS CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, POWELL V. TEXAS, 492 US 680,685(1989)(AND ITS' PROGENITORS AND PROGENY) CONCERNING THE DENIAL OF PRE-EVALUATION RIGHT TO COUNSEL:

SUPPORTING FACTS: As set out in 02-P-20 brief and ALOFAR pages 28-29,48-49 with state Appendix II:352,373-379;III:574-576; IV:669 n. 40, 780, and April 20,1999 transcript cited therein, the state Court erroneously denied pre-[MGL c.123,§ 15(a)]competency evaluation counsel n.14/when denying retrial counsel without any waiver of counsel by Petitioner [who evaluation reports show had asserted his right to counsel to evaluation staff before each stage of such c.123,§ 15(a) competency evaluations].

This issue basically presents the question of whether a state judge can deny counsel under a waiver by conduct theory prior to receiving competency evaluation the judge had denied counsel for pre-evaluation advice to petitioner,with no subsequent July 1,1999 or other court hearing ruling on the issue of competency prior to or during December 13,1999 plea.

The state Superior Court made no findings on this issue and the 02-P-20 Appeals Court panel also made no factual findings,avoiding this issue,while purporting to make an overall waiver by misconduct legal ruling.Ground Fourteen may, therefore, be subject to de novo review in these 28 USC § 2254 proceeding,for which Petitioner requests Habeas Rule 8(c) CJA assignment/appointment of counsel,id.

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n.14/Delguidice V. Singletary,84 F3d 1359,1363(11th Cir 1996); UNITED STATES V. KLAT,156 F3d 1258,1262-1265(DC Cir 1998);APPEL V. HORN,250 F3d 203,209-218(3rd Cir 2001);UNITED STATES V. PURNETT, 910 F2d 51,55-56(2nd Cir 1990) hold a Court cannot decide on a waiver of counsel prior to the evaluation being conducted and there is a right to counsel's advice prior to any such competency evaluation.A Habeas Rule 8 evidentiary hearing may also be necessary to fully develop the record of Ground Fourteen facts,id.

120) GROUND FIFTEEN: STATE DECISIONS CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, UNITED STATES V. DIXON, 509 US 688, 698, 712(1993); PAYNE V. VIRGINIA, 468 US 1062(1984); HARRIS V. OKLAHOMA, 433 US 682, 683(1977); BROWN V. OHIO, 432 US 161 (1977); MENNA V. NEW YORK, 423 US 61, 62-63(1975)n.15/ CONCERNING VIOLATION OF PETITIONERS' DOUBLE JEOPARDY CLAUSE RIGHTS ARISING FROM STATE SUBSEQUENT IMPOSITION OF 3,000 DAYS c.127, § 129 GREATER OFFENSE "INFAMOUS PUNISHMENT" ONLY AFTER A PRIOR c.265, § 17 LESSER OFFENSE CONVICTION:

SUPPORTING FACTS: As set out in 02-P-20 brief and ALOFAR pages 16-17, 01-P-1792 brief and ALOFAR pages 4-6, 27-30, rehearing petition, appendix/transcript citations therein, incorporated herein by reference MGL c.265, § 17 armed robbery is a lesser included offense of c.127, § 129 "any offense" committed inside a prison while serving a lawful sentence, because § 129 incorporates the entire MGL Massachusetts Criminal Offense Code; but state Superior and Appeals Court Judge's refused to follow United States Supreme Court decisions (set out in Ground Fifteen heading) and the state courts failed to make factual findings (which may now permit federal habeas court de novo review).

After December 13, 1999, March 14, 1999, November 10, 200 lesser c.265, § 17 armed robbery sentence conviction, the Respondent violated Petitioner's double jeopardy clause rights by subsequently imposing 3,000 days § 129 greater offense aggravated punishment. Habeas Rule 6 discovery for Rule 7 expanded record and Rule 8 evidentiary hearing may be necessary to develop the post-11/10/00 sentence record of whatever ex parte D.O.C. procedures, prosecution and aggravated sentence imposition hearing or administrative non-hearing action took place (Respondent has concealed such facts from Courts and Petitioner in state proceedings).

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n.15/ This Ground is properly before the Court because the Petitioner's "guilty plea admitted no (c.127, § 129) factual predicate that sufficed to make irrelevant his double jeopardy claim", JACKSON V. COALTER, 337 F3d 74, 80 (1st Cir 2003) and the almost double aggravated punishment statute, c.127, § 129 words "any offense" incorporated all Massachusetts General law crimes into § 129 making c.265, § 17 a lesser included offense, UNITED STATES V. DIXON, 509 US 688, 698, 712(1993).

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12P) GROUND SIXTEEN: DOC ATTY SLADE'S AND RESPONDENT'S EMPLOYEE'S n.16/
DENIAL AND OBSTRUCTION OF ACCESS TO DOC AND PAROLE FILES COMBINED
WITH ASSIGNED ATTY RAPPAPORT BEING TOO LAZY TO PREPARE FOR STATE
HEARINGS AND WITHHOLDING PAROLE FILES WITH ATTY FITZPATRICK,DENIED
THE PETITIONER HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE
PROCESS, A FUNDAMENTALLY FAIR HEARING AND THE EFFECTIVE ASSISTANCE
OF COUNSEL:

SUPPORTING FACTS: As set out in 01-P-1792 brief and ALOFAR pages
8-13,41-48,appendix/transcript citations therein,incorporated
herein by reference, Respondent's Attorneys and employee's
denied and obstructed Petitioner's access to necessary DOC and Parole
Board CORI files, while incompetent and lazy assigned Attorney
Steven rappaport failed to prepare for state hearings,failed to
file any pleadings or promised memorandum in support of relief
and withheld Petitioner's PLAP copy of Parole/Court files with
Attorney John Fitzpatrick (unethically), resulting in the loss
of an opportunity for a fundamentally fair habeas corpus hearing,
proper fact-finding and an evidentiary hearing which had been
recommended by Judge Elizabeth Dolan in DuPont V. Mass. Parole
Board but not held in DuPont V. Maloney,Commissioner habeas
proceedings because of the combined concealment by all Attorneys
involved.

Rule 8(c) assignment of CJA counsel for a
federal Rule 8 evidentiary hearing to fully develop the facts,
is respectfully requested on Ground Sixteen.

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n.16/In addition to DOC Staff employee's at Walpole and MCI
Concord,with Parole employee's, obstructing and denying timely
CORI access in 1999-2001, DuPont V. DuBois,92-12420-RCL
and 97-11087-RCL Attorney David Rentsch may have been the
person directing CORI access denial as part of his scheme to deny
discovery in those civil rights actions now pending before Judge
Reginald C. Lindsay,id.

12.

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Ground ~~SEVENTEEN~~ SIXTH AND FOURTEENTH AMENDMENT VIOLATION BASED UPON PREJUDICIAL CONFLICT OF RESENTENCING COUNSEL'S INTERESTS, CONTRARY TO MICKENS V. TAYLOR, 535 US 162(2002)(And Cases Cited Therein)

As set out in 02-P-20 brief and Supporting FACTS (state briefly without citing cases or law) ALOFAR pages 18-21 n.21,48-49 and appendix IV:725-791 and 11/10/00 resentencing transcript; assigned Attorney John Swomley laid down at sentencing, failing to make lesser sentence recommendation, failing to argument mitigation of file sentencing memorandum, after deliberately filing expert request too late, which followed Swomley telling Petitioner (on 9/27/00) that he had a conflict of interest based upon a friend who Swomley loved, CPCs staffmember Leslie Walker approaching Swomley in church saying she was afraid the Petitioner would kill her if released(also see Appendix I:151-194 on prior malpractice and other complaints Petitioner filed against Walker). Swomley and co-counsel Edmund Robinson also had a conflict based on BBO (Board of Bar Overseers) and CPCs complaints Petitioner filed after Swomley asked Petitioner to pay/retain him despite petitioner's indigence

18 FIFTH, SIXTH AND FOURTEENTH AMENDMENT DOUBLE JEOPARDY,

Ground ~~Eighteen~~ SPEEDY-TRIAL-APPEAL-SENTENCING VIOLATION DISPOSITIVE ISSUES CONTRARY TO MENNA V. NEW YORK, 423 US 61(1975); BARKER V. WINGO, 407 US 514(1972) AND THEIR PROGENY, WITHOUT DEFERENCE TO STATE COURTS THAT FAILED TO DECIDE ISSUES ON APPEAL.

Supporting FACTS (state briefly without citing cases or law) As set out in 02-P-20 brief and ALOFAR pages 2,9 n.12,11,13-14,16,21-32,34,41-43,50 n.75,n.76,n.77, n.78 and Appendix I:121 n.41,123-124; II:255-277,335-339; III:442-464, 562,596-600; IV:609-637K; V:801-923,974-1000; VI:1000-1200, incorporated herein, the state Appeals Court failed to decide Petitioner's presentation of dispositive issues related to DUPONT V. SUPERIOR COURT, 401 Mass 122(1987) assault with intent to rob autrefois convict plea of double jeopardy bar to armed robbery retrial or replea; a 12 year prejudicially obstructed direct 89-P-440 direct appeal and related 13 year sentencing delay, with two series(first trial and second retrial) of speedy trial violations (which Appeals Court denied extra pages to more extensively argue). Prejudice included loss of retrial witnesses, inability to prepare, denial of Hep "C" treatment reducing normal life expectancy, severe anxiety, and other prejudice in record, id.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:
-
-
-

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes No

15. Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein:

(a) At preliminary hearing Eugene Lucarelli

(b) At arraignment and plea not guilty Fred Hewitt Smith

- (c) At trial and guilty plea pro se
-
- (d) At sentencing 1/19-20/00, 3/14/00 pro se sentencing then at resentencing
on 11/10/00 Attys John Swomley & Eugene Robinson
-
- (e) On appeal pro se
-
- (f) In any post-conviction proceeding pro se
-
- (g) On appeal from any adverse ruling in a post-conviction proceeding pro se
-

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and the same time?

Yes No

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes No 30 days in County Jail

(a) If so, give name and location of court which imposed sentence to be served in the future: Wrentham
District Court

(b) Give date and length of the above sentence: Sentenced sometime in
Summer 2001??? 30 days County Jail
with consecutive probation

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes No Pending Superior Court Motions Court Refuses To Rule On;
and I hope to file certiorari petition in Supreme Court

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

AND ALLOWS RULE 6 DISCOVERY AND A

RULE 8 EVIDENTIARY HEARING WITH

Rule 8(c) Assignment/ Appointment
of Co-Counsel for Petitioner

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

June 18, 2004.
(date)


Signature of Petitioner

(24)